United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1811 ORIGINAL

To be argued by
THOMAS J. O'BRIEN

B
P/S

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

ROBERT DONOVAN and DENNIS D'AMATO,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of New York.

BRIEF AND APPENDIX FOR APPELLANT, ROBERT DONOVAN

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
DOCKET NO. T 3537

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UNITED STATES OF AMERICA,

Appellee,

-against-

ROBERT DONOVAN and DENNIS D'AMATO,

Appellants.

- -X

PRELIMINARY STATEMENT

The appellant, Robert Donovan, was found guilty by a jury on two counts of mail fraud in violation of 18 U.S.C. §1341 and was sentenced to 120 days imprisonment and two years probation on each count to run concurrently. His co-defendant, Dennis D'Amato, was acquitted on both mail fraud counts but convicted on one count of making a false statement in violation of 18 U.S.C. §1001. The appellant, Donovan, was not named in the false statement count.

This is an appeal by the Appellant, Donovan, from that conviction.

STATEMENT OF FACTS

Counts one and two of the superceding indictment 73 CR 1093, charged the defendants Donovan and D'Amato with devising a scheme to sell a hair conditioner in jars labeled "Ultra Sheen", which the defendants are alleged to have falsely represented as the genuine "Ultra Sheen" sold by Johnson Products Co., Inc. (*A 4a, 5a, 6a)

The mailing the defendants are alleged to have caused in Count one, was a letter dated January 18, 1972, mailed by Carr-Lowrey Glass Co., Inc., 415 Madison Avenue, New York, New York, to Zimmer & Associates, 1500 Main Street, Port Jefferson, New York. Count two concerned a purchase order, dated February 17, 1972, allegedly mailed by Zimmer & Associates to Carr-Lowrey Glass Co., Inc.

It is not in dispute that the evidence at trial proved that Exhibits 3 and 4 contained a genuine Johnson Products Co., Inc.'s hair conditioner labeled "Ultra Sheen" and that Exhibits 5 through 10 contained a product falsely labeled "Ultra Sheen". (*TR 100 to 102; 183 to 186). It is further undisputed that the evidence proved that the

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*A - Appendix
*TR- Transcript of Trial Minutes

defendant, Dennis D'Amato sold Exhibits 5 through 10 to various suppliers and wholesalers (TR 149 to 176).

Mr. D'Amato's contention at trial, that he did not know the product was counterfeit at the time he sold it, was apparently accepted by the jury as evidenced by their vote of not guilty on those charges.

The evidence presented against Robert Donovan is as follows:

Robert Donovan opened a telephone answering service with Mr. Reinke at North Shore Answering Service, 1500 Main Street, Port Jefferson, New York, for the account of Zimmer & Associates in September, 1971 (TR 2 to 5, 15). Mr. Reinke never asked Mr. Donovan whether he was Mr. Zimmer (Tr 18) and Mr. Reinke did not know whether there were other principals in the business, Zimmer & Associates (TR 16-17). Mr. Donovan paid the service charge in person and instructed Mr. Reinke not to send anything through the mail (TR 6, 21).

Mr. Hussey, a salesman for Carr-Lowrey Glass Co., Inc., testified that he sent the letter (Exhibit 16), which forms the basis for Count one, to Zimmer & Associates after receiving a telephone call from a man who identified himself

as George Zimmer (TR 40-41). Mr. Hussey did not tell Mr. Zimmer that he was going to send him the letter and although Mr. Zimmer never asked him to send the letter, Mr. Hussey sent it as a matter of practice. The letter, Exhibit 16, stated:

"January 18, 1972

Zimmer & Associates
1500 Main Street
Port Jefferson Station
Long Island, New York

Subject: Our 8-Oz. #250, #447, #500, #600
Flint Jars

Dear Mr. Zimmer:

As a result of our conversation yesterday morning under separate cover you will receive a sample of the above mentioned ware. Upon receipt of same please ask your customer which bottle they prefer and we will be glad to give you any information regarding quantity, prices and delivery.

I would appreciate your contacting us, however, in the event that you are not able to approach us on minimum gross requirements, we will see what we can do for you.

Very truly yours,

CARR-LOWREY GLASS COMPANY

E. HUSSEY

EH/ba"

Mr. Hussey testified that he received the purchase order, (Exhibit 18) which forms the basis of Count two,

from Zimmer & Associates by mail because "it has our stamp of receipt on February 22" (TR 43). On cross examination he stated that buyers do come up to the showroom but that he personally never had a purchase order hand delivered at the showroom (TR 52). Further inquiry into this line of questioning was objected to by the Government and sustained by the Court (TR 52).

Mr. Hussey further testified that he never met Mr. Zimmer, (TR 52), and that he never met Robert Donovan (TR 52). Moreover, the Government offered no evidence to establish who the "Mr. Zimmer" was who placed the telephone call to Mr. Hussey or who signed the signature "George A. Zimmer" on the purchase order.

The balance of the Government's case against Robert Donovan established that the empty jars ordered from Carr-Lowrey were delivered on March 3, 1972, by Mr. Bausch to Ideal Decorating Company in Brooklyn, New York (TR 59 to 62). Mr. Bausch identified Robert Donovan as the person who asked Mr. Bausch to deliver the empty jars (TR 61). A motion to strike Mr. Bausch's identification testimony was denied (TR 64 to 77).

The jars were silk screened with the label "Ultra

Sheen" at Ideal Decorating which is owned by Sidney Bookbinder who was available but did not testify (TR 89-95). The actual silk screening was done by Mr. Chavis (TR 90-92) with a silk screen made by him (TR 98) at Mr. Bookbinder's request (TR 99) in 1971 (TR 244). Mr. Chavis further testified that he did not know Robert Donovan (TR 98).

The Government failed to prove that Robert Donovan ordered the silk screening or that he received the jars after they were labeled, or that he had the jars filled with the counterfeit Ultra Sheen or that he supplied Dennis D'Amato with the Ultra Sheen product to sell. The only evidence of what Ideal Decorating, a/k/a Sidney Bookbinder, did with the jars was an invoice (Exhibit 22) which was received in evidence (TR 208) over objection (TR 93, 94, 105 to 109). That invoice, of questionable validity, was prepared by Mr. Bookbinder and was addressed to Zimmer & Associates, 14 Metropolitan Avenue, Brooklyn, New York -- an address which does not exist and was never connected with Robert Donovan (TR 93, 94, 208).

QUESTIONS PRESENTED

(1) Whether the evidence presented was insufficient to sustain a conviction for mail fraud.

(2) Whether identification testimony should have been excluded.

(3) Whether Exhibit 22 was inadmissible.

(4) Whether the court erred in its charge and refusal to charge as requested.

ARGUMENT

POINT I

THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE CONVICTION.

The three essential elements of the crime of mail fraud, 18 U.S.C. §1341, which the Government must prove beyond a reasonable doubt are:

A) That the defendant devised a scheme or artifice to defraud.

B) That the defendant mailed or caused to be mailed the letter and purchase order specified in the indictment and

C) That the use of the mail was for the purpose of executing the scheme to defraud.

United States v. Maze, 414 U.S. 395 (1974); Parr v.

United States, 363 U.S. 370 (1960); Pereira v. United States, 347 U.S. 1 (1954); United States v. Baren, 305 F2d 527 (2 Cir. 1962).

We submit that the Government failed to prove any of the three stated elements beyond a reasonable doubt.

Each of the elements will be discussed separately.

A) SCHEME TO DEFRAUD - FIRST ESSENTIAL ELEMENT

The words "scheme" and "artifice" as used in 18 U.S.C. §1341 include any plan or course of action intended to deceive others, and to obtain, by false or fraudulent pretenses, representations or promises, money or property from persons so deceived. Parr v. United States, supra.

The indictment alleged a scheme to sell a counterfeit hair conditioner falsely labeled "Ultra Sheen". The evidence showed that Robert Donovan opened an account for Zimmer & Associates in September, 1971. In January, 1972, a man named Zimmer called Carr-Lowrey and asked for samples of jars for his customer. On February 22, 1972, a purchase order was received by Carr-Lowrey from Zimmer & Associates, 1500 Main Street, ordering certain empty jars. Those empty jars were delivered under Robert Donovan's direction to Ideal Decorating. Ideal Decorating, under Mr. Bookbinder's orders, silk screened the jars Ultra Sheen from a screen he had made in 1971. Mr. Bookbinder was not

called as a witness. Thereafter, in or about June, 1972, those jars containing counterfeit Ultra Sheen were sold by Dennis D'Amato.

The evidence failed to show that Zimmer & Associates ordered the silk screening or caused the jars to be filled with a counterfeit product or ever possessed or sold any counterfeit Ultra Sheen. In summary, the Government's case failed to provide the missing link between the legitimate purchase of empty jars by Zimmer & Associates and the fraudulent sale of a counterfeit product.

Accordingly, we submit that even if this court finds that there was sufficient evidence to find that Zimmer & Associates was in fact Robert Donovan there was still insufficient evidence to conclude that Robert Donovan devised or knowingly participated in a fraudulent scheme to sell counterfeit Ultra Sheen.

B) MAILING OR CAUSING TO BE MAILED
SECOND ESSENTIAL ELEMENT

The evidence must prove either that the defendant Robert Donovan mailed the letter and purchase order specified in the indictment or that he caused it to be mailed.

One "causes" the mails to be used where he does an

act with knowledge that the use of the mails will follow in the ordinary course of business or where such use can reasonably be foreseen.

United States v. Maze, supra; Pereira v. United States, supra.

LETTER

We submit that the letter sent by Carr-Lowrey to Zimmer & Associates was not caused to be mailed by Robert Donovan.

First, there is no proof that Robert Donovan made the telephone call the day before the letter was sent. The evidence forces us to speculate as to who the caller was. Moreover, we contend, the caller could not have known or reasonably foreseen that a mailing would follow. Mr. Hussey did not tell Mr. Zimmer that he would send him a letter and Mr. Zimmer never asked him to send the letter. The letter (Exhibit 16) taken together with the testimony (TR 51) makes it clear that samples had been ordered by telephone. Therefore, the letter was unsolicited, unexpected and served no purpose.

Moffitt v. United States, 154 F2d 402 (10 Cir. 1946) cert. denied 328 U.S. 853, seems to be directly on point.

There the defendant deposited a forged check in a bank in Oklahoma for collection with a bank in New York. Count one charged the mailing of the check from Oklahoma to New York. Count two charged the mailing from New York to Oklahoma advising that the check had been paid.

When the Oklahoma bank sent the check to New York it requested the New York bank to confirm the payment by wire. The New York bank not only sent the wire but also a letter confirming that the wire had been sent. Count three charged that confirming letter.

In dismissing Count three, the court said at pages 406, 407 of 154 F2d:

> "There is no evidence in the record that this was the usual and ordinary practice followed by the bank in handling collection items and <u>there is a complete absence of any evidence that appellant was informed of such a custom or that such a procedure would be followed in this instance</u>. He had no reason, therefore, to believe or know when he deposited the check for collection that such a telegram would be required, or that if it was required, that a further letter also would be mailed confirming the telegram". (Emphasis added)

Therefore, even if the evidence conclusively proved that Donovan was the caller, he had no reason to believe or know that anything other than the samples would be shipped.

On the other hand, even if this court deems it reasonable to infer that the caller knew or could have reasonably foreseen that the letter would follow, Donovan still could not be found guilty unless an additional inference was drawn that Donovan was the caller. To do this would require piling inference upon inference in the absence of direct proof, which we submit is unreasonable. Looney v. Metropolitan R. Co., 200 U.S. 480, 488 (1906); United States v. Ross, 92 U.S. 281 (1875).

In short this is simply guessing Donovan into a federal penitentiary. It may be good guessing, but it is not sufficient evidence to cause a reasonable man to believe beyond a reasonable doubt that the defendant Donovan was guilty. United States v. Taylor, 464 F2d 240 (2 Cir. 1972).

PURCHASE ORDER

It is clear that the purchase order was signed "George Zimmer" and received by Carr-Lowrey but it is not clear whether Robert Donovan signed "George Zimmer" or whether the purchase order was mailed.

It should be kept in mind that the issue here is not whether Robert Donovan mailed the purchase order but rather whether the Government proved beyond a reasonable doubt

that it was mailed and that Donovan knew it was mailed.

The only evidence that it was mailed was the following testimony:

> "Q. How did you receive this letter?
> A. By the mail, it has our stamp of receipt on February 22." (TR 43)

When counsel attempted to cross examine as to whether the purchase order was hand delivered and stamped, the court sustained the Government's objection to that line of questioning (TR 52). As a result we submit that the Government failed to sustain its burden of proving beyond a reasonable doubt that the letter was mailed.

Furthermore, there was no proof whatever that Donovan signed the letter. Handwriting testimony was available but none was produced.

In Brady v. United States, 24 F2d 399 (8 Cir. 1928) cert. denied 278 U.S. 603, the proof that a letter was received was:

> "Q. Now, I call your special attention to Exhibit 10. How did you receive that exhitit?
> A. Through the mail."

There in holding that the proof was insufficient to support the conviction the court said at 24 F2d 403, 404:

"There is no direct evidence that defendants wrote the letters or that they deposited them in the post office directed to Mergen with postage prepaid, or that they otherwise caused them to be delivered to Mergen through the mails. The envelopes in which the letters were mailed are not in the record and apparently were not introudced in evidence. The genuineness of the purported signatures to the letters does not appear to have been directly established. The fact that the defendants caused such letters to be delivered to Mergen through the post office at Beloit, Kan., must be inferred, if at all, from the fact that the letters purport to have been written either by McClintock or by Brady, that the letters are addressed to Mergen at Beloit, Kan., and that Mergen testified he received such letters through the mail. To sustain the judgment, we must hold that the jury were warranted in presuming from this evidence, and this evidence alone: First, that the letters were inclosed in envelopes addressed to Mergen at Beloit, Kan.; second, that the defendants caused the letters to be duly stamped and mailed; and, third, that the post office at Beloit, Kan., received them and delivered them to Mergen. To do this, we would have to permit presumption to be built upon presumption. From the fact that the letters contained in themselves the address of L.A. Mergen, Beloit, Kan., the presumption would have to be drawn that they were enveloped, properly stamped, and addressed to Mergen at Beloit, Kan. From this presumption, the presumption would have to be raised that the defendant Brady caused them to be mailed, so addressed, and from the last presumption the presumption would have to be drawn that the post office establishment delivered them at Beloit, Kan., to Mergen. It is well settled that presumptions cannot be based on presumptions. Vernon v. United States (C.C.A. 8) 146 F. 121. 126; 22 C.J. p. 84, Section 27, page 99, Section

> 40. We conclude that the evidence was insufficient to support the verdicts of guilty. See Freeman v. United States (C.C.A. 3) 20 F. (2d) 748."

See also United States v. Baker, 50 F2d 122 (2 Cir. 1931) where the testimony was that the letter in Count five came through the mails because of the addressee's stamp it bore. The stamp read "Mailing Division". There was no evidence that that letter in Count 5 might have been hand delivered. There the court reversed the conviction because the foregoing facts did not amount to proof beyond a reasonable doubt.

We submit that the facts herein are identical and accordingly the appellant herein is entitled to the same result.

C) MAILING FOR THE PURPOSE OF EXECUTING THE SCHEME - THE THIRD ESSENTIAL ELEMENT

In a recent case, United States v. Maze, supra, the Supreme Court faced "the more difficult question of whether these mailings were sufficiently closely related to respondent's scheme so as to bring his conduct within the statute" held that the mailings must be for the purpose of executing the scheme and not merely collateral or incidental to it.

In reaching that result, the Court said:

> "Congress could have enacted the mail fraud statute so as to require only that the mails be in fact used as a result of the fraudulent scheme. But it did not do this; instead it required that the use of the mails be for the purpose of executing such a scheme or artifice --Since the mailings in this case were not for that purpose, the judgment of the Court of Appeals (reversing the conviction) is affirmed."

Under the facts of the Maze case, the scheme was to obtain goods and services by the fraudulent use of credit cards, and the respondent knew that each merchant would mail the credit card sales slip for payment. Yet those mailings were held to be collateral and incidental to the fraud.

Under the facts of our case, the scheme was to obtain money and property by means of false and fraudulent pretense, representations, and promises to sell, dispose of, distribute, supply, furnish and procure for unlawful use, counterfeit Ultra Sheen. The mailings herein were used to purchase empty jars. Accordingly, we submit that the mailings herein were not used "for the purpose of executing such scheme" but rather, at best, were merely incidental or collateral to that scheme.

As this court said in United States v. Chason, 451

F2d 301 (2 Cir. 1971), not every tangential use of the mail is essentially local fraud cases makes them into federal issues. In determining whether the use of the mails was sufficiently a part of the fraudulent scheme as to permit prosecution for federal mail fraud you must consider the extent of contribution which the mails make to the success of the scheme and find that the use of the mails was an essential ingredient of the scheme.

Moreover, in Berg v. United States, 144 F2d 173, 175 (3 Cir. 1944), it was held that in order to constitute a mail fraud it is necessary that a scheme to defraud be devised prior to the date of the first mailing. In our case the first mailing was on January 18, 1972, while the first sale under the scheme did not occur until June 1972.

Therefore, we contend that the defendant Donovan is entitled to a judgment of acquittal.

POINT II

IDENTIFICATION TESTIMONY SHOULD HAVE BEEN STRICKEN.

After Mr. Bausch identified Mr. Donovan (TR 61), counsel learned that photographs had been shown to the witness and moved for a hearing. (TR 64-65).

At the hearing, Mr. Bausch testified that he first met Mr. Donovan on March 3, 1972, when he saw him for approximately 3 or 4 minutes (TR 67 and 72). Approximately 10 months thereafter, on January 10, 1973, Mr. Bausch was shown about 10 photographs by a postal inspector, who asked him if he recognized anyone (TR 66 to 69). Among the photographs shown were two photographs of Robert Donovan, but not any duplicate pictures of any of the other individuals depicted. A moustache and sideburns had been drawn on one of the photographs of Robert Donovan. (TR 69). Mr. Bausch selected two photographs, one of the defendant Robert Donovan and one of Mr. Donovan's brother, and said "These look very much alike. They look like the people that I seen at that date" (TR 71). That the two photographs resembled the one man that he spoke with on March 3, 1972 (TR 72). Mr. Bausch was also asked if another photograph resembled the man that he spoke with. His answer was "I don't think so". The photographs were again shown to Mr. Bausch at the United States Attorney's office in April, 1972 (TR 70).

Mr. Bausch also described Mr. Donovan as tall, about 5'10" (TR 82). (Mr. Donovan is 6'4").

After the hearing, counsel's motion to exclude the testimony was denied (TR 74 to 78). We submit that the denial was error, since the photographic identification "was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable mis-identification", Simmons v. United States, 390 U.S. 377 (1968) and the Government failed to establish by "clear and convincing evidence" that the in court identification had an "independent source". United States v. Wade, 388 U.S. 218 (1967).

POINT III

EXHIBIT 22 WAS INADMISSIBLE.

Exhibit 22 was an Ideal Decorating Company invoice addressed to Zimmer Associates, 14 Metropolitan Avenue, Brooklyn, New York, an address that does not exist (TR 94). The invoice, numbered 03951 and dated March 10, 1972, covered a product "Ultra Shine" (TR 106), rather than "Ultra Sheen".

Mr. Chavis, a foreman and mechanic at Ideal Decorating (TR 89, 95), testified that the invoice was made in the regular course of Ideal's business (TR 93). It was admitted, however, that the invoice was prepared by the

"administrative people" and not by Mr. Chavis (TR 107), whose duties do not include that part of the business (TR 97, 98, 246). He further testified that since it was a record kept in the ordinary course of business, Ideal would also have in its possession invoices numbered 03950 and 03951 (TR 96-97). The next day he produced Exhibits E, F and G. Exhibit E was a group of loose invoices prefixed with the numbers 03 which were given to him by Mr. Bookbinder, the owner of Ideal Decorating. Exhibits F and G were bound invoices which were prefixed with the numbers 01 and 02 respectively. Mr. Chavis did not know why E was loose and F and G were bound (TR 241-245). Invoices 03950 and 03952 were not produced. Mr. Bookbinder who was available was never produced as a witness.

Government Exhibit numbered 22 was received in evidence (TR 208), over objection (TR 93, 105 to 109, 208). We submit that the evidence was improperly received in evidence in that, a proper foundation had not been laid, the evidence lacked the probability of trustworthiness and deprived the defendant of his constitutional right to confront witnesses against him.

While it is clear that the person who actually prepared or kept the records need not testify, the person who testifies must be in a position to attest to their authenticity and be sufficiently familiar with that part of the business, to testify that the record in question was made as a regular business practice. United States v. Rosenstein, 474 F2d 705 (2 Cir. 1973); United States v. Dawson, 400 F2d 194, 199 (2 Cir. 1968). Simply stated, Mr. Chavis was not that person.

Even if the record meets the technical requirement of a business record under 28 U.S.C. Section 1732, this court has repeatedly held that it should not be admitted unless after "careful scrutiny" there is "assurance" that the record is "accurate" and has an "inherent probability of trustworthiness". Bowman v. Kaufman, 387 F2d 582, 587 (2 Cir. 1967) and cases cited therein.

This invoice was not trustworthy. It was prepared by Mr. Bookbinder who the Government admitted was involved in this scheme. Therefore, the record could have been prepared to exculpate himself and inculpate Zimmer Associates. The invoices prefixed 03 were loose, while the

ones prefixed 02 and 01 were bound. The invoices immediately prior to Exhibit 22 were never produced. Exhibit 22 covered the product "Ultra Shine" rather than "Ultra Sheen". The invoice was addressed to 14 Metropolitan Avenue, Brooklyn, New York, which does not exist while the proof established that Zimmer & Associates used the address 1500 Main Street, Port Jefferson, New York, which does exist.

Moreover, Mr. Bookbinder who was available, was never produced as a witness. While we recognize that all documents admitted under Section 1732 are not transgressions on a defendant's Sixth Amendment right of confrontation, certain records can reach such constitutional proportions. McDaniel v. United States, 343 F2d 785 (5 Cir. 1965).

In United States v. Burruss, 418 F2d 677 (4 Cir. 1969), the court reversed a conviction where a police report, admitted into evidence, was the only proof that a car was stolen. There the court said at page 679:

> "In a criminal case, use of such records to prove commission of the crime deprives the defendant of the constitutionally guaranteed opportunity to confront the accuser. We conclude that the evidence was incompetent and should have been excluded."

Under the facts herein, the invoice was the only proof on which the jury was asked to infer that Zimmer & Associates ordered the jars to be labeled "Ultra Sheen." Absent that evidence, there was no connection between the delivery of the empty jars and the fraudulent sale. Absent Mr. Bookbinder's testimony, we contend, the invoice should have been excluded.

POINT IV

THE COURT'S CHARGE AND ITS REFUSAL TO CHARGE AS REQUESTED WAS ERROR.

At the conclusion of the court's charge, counsel took exception (TR 348) to that portion wherein the court instructed the jury:

> "[N]or is it necessary that the scheme contemplated the use of the mails (TR 334-5)."

Counsel also requested the court to charge defendants requests numbered 5 and 7 (TR 349).

Request number 5 was:

> "REQUEST NO. 5
> FOR THE PURPOSE OF EXECUTING THE SCHEME
>
> The federal mail fraud statute does not purport to reach all frauds but only those limited instances in which the use of the mails is a part of the execution of the fraud leaving all other

cases to be dealt with by appropriate state law. Therefore, you must acquit the defendants unless you find beyond a reasonable doubt that the mailings were a part of the execution of the fraud or were incident to an essential part of the scheme."

"Parr v. United States, 363 U.S. 370 (1960); Kann v. United States, 323 U.S. 88, 94."

Request number 7 was:

"REQUEST NO. 7
PROOF REQUIRED

Not every tangential use of the mails is essentially local fraud cases makes them into federal issues.

In determining whether the use of the mails was sufficiently a part of the fraudulent scheme as to permit prosecution for federal mail fraud, you must consider the extent of contribution which the mails make to the success of the scheme and find that the use of the mails was an essential ingredient of the scheme. United States v. Chason, 451 F2d 301 (2 Cir. 1971)."

We recognize that the quoted portion of the judge's charge, "it is not necessary that the scheme contemplate the use of the mails," was taken from the court's decision in Pereira v. United States, supra, 347 U.S. at 8, but submit that, in light of United States v. Maze, supra, the instruction was error.

In Maze, supra, 94 S. Ct. at 648, the court pointed out that the Government was relying upon Pereira for the

proposition that "it is not necessary that the scheme contemplate the use of the mails as an essential element" and that the defendant was relying upon Kann v. United States, 323 U.S. 88, 94, for the proposition that the mailing must be "for the purpose of executing the scheme as the statute requires."

Although the court did not specifically overrule Pereira, it pointed out 94 S. Ct. at 649 that the mailings in Pereira played a significant part in the Defendant's fraud. Therefore, we contend that the court's holding in United States v. Maze, supra, overruled by implication, that part of the holding of the Pereira decision that "it is not necessary that the scheme contemplate the use of the mails." Hence, the court's charge of that phrase was error.

Moreover, we submit that although the court did charge that the Government was required to prove beyond a reasonable doubt:

> "That a defendant did use or cause another to use the United States Mails for the purpose of executing the scheme." (TR 331)

The court did not sufficiently expand upon that element to make it intelligible to the jury. Specifically

we contend that the courts combined two elements--"causing" and "for the purpose of executing the scheme" into one thereby confusing and possibly misleading the jury into believing that if they found that the defendant caused the mailings of the matters set forth in the indictment, that they were guilty.

In addition, we contend that the court's failure to charge as requested by the defendant Donovan, deprived the defendant of his defense and entitles him to a new trial.

CONCLUSION

The Appellant Donovan's conviction should be reversed.

Respectfully submitted,

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DOCKET ENTRIES

D. C. Form No. 100
CRIMINAL DOCKET

JUDGE GAGLIARDI 73 CRIM. 1093 (S)

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U. S.:
vs.	Howard Wilson, AUSA
ROBERT DONOVAN, a/k/a George Zimmer-1&2	264-6426
DENNIS D'AMATO- all counts.	
	For Defendant:

ABSTRACT OF COSTS (05)	AMOUNT	CASH RECEIVED AND DISBURSED — DATE	NAME	RECEIVED	DISBURSED
Fine,		12/4/74	LaRosa	$ -	
Clerk,	✓	5/31/74	Treas		$ -
Marshal,	✓	6/3/74	O'Brien	$ -	
Attorney,		6/4/74	Treas		$ -
Commissioner's Court 18					
Title 1341,2 & 1001					
Mail fraud(Cts1&2)					
False statements.(Ct.3)					
(Three Counts)					

DATE	PROCEEDINGS
12-4-73	Filed indictment. (Referred to Judge Gagliardi as superseding 73Cr577)
12-18-73	BOTH DEFTS- plead not guilty,before Judge Gagliardi- jury trial begun.
12-19-73	Trial cont'd & concluded. Pre-sentence investigation orderedfofor sentence 2-20-74 at 9:30AM. Both defts released on own recognizance. Gagliardi,J.
2/13/74	D. D'Amato-filed notice of motion re: dismissal of count 3; ret. 2/27/74.
2/13/74	D. D'Amato-filed memo of law in support of motion to dismiss ct. 3.

DATE	PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT
~~2/21/74~~	~~Filed Govt's Affdvt in opposition to deft Delcamy's motion for order setting aside judgments of conviction.---error~~		
~~2/21/74~~	~~Filed Govt's Memo of law in opposition to motion for order setting aside judgment of conviction.----------error~~		
5/28/74	DENNIS D'AMATO- (atty present) Filed Judgment- Deft is sentenced to the custody of the Atty Gen'l for imprisonment for a period of SIXTY (60) DAYS. Execution of prison sentnece issuspended and the deft. is placed on probation for aperiod of EIGHTEEN (18) MONTHS, subject to the standing Probation order of this Court. Geg 5/30/74 Issued copies. ent. 5/20/74		
5/28/74	ROBERT DONOVAN- (atty present) Filed Judgment- Deft is hereby committed to the custody of the Atty. Gen'l or his authorized representative for imprisonment for a period of ONE-HUNDRED and TWENTY (120) DAYS on each of counts one (1) and two (2) concurrently. Counts 1 and 2 yrs. prob. - to commence upon expiration of confinement, subject to the standi probation order of this Court. Deft. is cont'd on present bail pending appeal. Gagliardi,J. 5/30/74 Issued commitments. ent. 5/20/74.		
5/..74	D. D'Amato- filed notice of appeal from judgment dtd 5/28/74. Mailed copies to: La Rossa,Shargel U Fischetti, U.S. Atty		
2/18/74	R. Donovan-filed notice of motion re: judgment of acquittal,etc.		
2/18/74	R. Donovan-filed memo of law on deft's post-trial motions.		
3/30/74	Filed Govt's memo of law in opposition to motion for judgment of acquitta		
5/30/74	Filed MEMO-END. on motion dtd 2/18/74. Deft Donovan's motion is denied. Gagliardi,J. mailed notice		
5/30/74	Filed MEMO-END. on motion dtd 2/13/74. Deft D'Amato's motion is denied. Gagliardi,J. mailed notice.		
6/3/74	Donovan-filed notice of appeal from judgment dtd 5/28/74. mailed copies.		

-cont'd on next page-

DATE	PROCEEDINGS
6/17/74	Filed ORDER that deft. Max Gersh is granted leave to depart the jurisdiction of this court to proceed to Plainfield, Vermont and environs for the purpose of a Father's Day visit with his son on June 16 through 17,1974,etc. Tenney,J. mn
6/14/74	Filed notice that the record on appeal has been certified and transmitted to the U.S.C.A.
6/21/74	DENNIS D'AMATO (atty present) Filed AMENDED JUDGMENT Judgmt. of 5/28/74 is amended as indicated. the deft. is sentenced to the custody of the Atty. Gen'l for imprisonment for a period of SIXTY DAYS (60). Execution of prison sentance is suspended and the deft. is placed on probation for aperiod of EIGHTEEN (18) MONTHS, subject to the standing probation order of this Court. The eighteen (18) months probation period is stayed pending appeal. Gagliardi,J. 6/24/74 issued copies. ent. 6/26/74

INDICTMENT (Filed December 4, 1973)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X

UNITED STATES OF AMERICA,

- v -

ROBERT DONOVAN, a/k/a George Zimmer, and
DENNIS D'AMATO,

Defendants.

- -X

The Grand Jury charges;

1. From on or about the 1st day of December, 1971, up to and including the date of filing of this indictment, ROBERT DONOVAN, a/k/a George Zimmer, and DENNIS D'AMATO, the defendants, and others to the Grand Jury known and unknown, unlawfully, wilfully and knowingly did devise and intend to devise a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations and promises and to sell, dispose of, distribute, supply, furnish and procure for unlawful use counterfeit and spurious articles.

2. It was a part of said scheme and artifice that

Indictment

ROBERT DONOVAN, a/k/a George Zimmer, would purchase and cause to be purchased over 27,000 jars and jar caps which were of the same size and type as those used in the manufacture of a hair conditioner and dressing called Ultra Sheen and would cause the said jars to be printed with a label identical in form to the label used on bottles of the true and genuine Ultra Sheen sold by Johnson Products Co., Inc.

3. It was further a part of said scheme and artifice that DENNIS D'AMATO would procure and obtain possession of counterfeit and spurious jars of Ultra Sheen and would thereafter sell said jars as the true and genuine Ultra Sheen.

4. On or about the dates hereinafter set forth, in the Southern District of New York, for the purpose of executing such scheme and artifice and attempting so to do, ROBERT DONOVAN, a/k/a George Zimmer, and DENNIS D'AMATO, the defendants unlawfully, wilfully and knowingly did place and cause to be placed in a post office and authorized depository for mail matter to be sent and delivered

by the Postal Service, and did take and receive and cause to be taken and received therefrom, and did knowingly cause to be delivered by mail according to the direction thereon, the matters and things hereinafter described:

Count	Date	From	To	Matter
1	January 13, 1972	Carr-Lowery Glass Co., Inc. 415 Madison Ave. New York, N. Y.	Zimmer & Associates 1500 Main St. Port Jefferson, New York	Letter
2	February 17, 1972	Zimmer & Associates 1500 Main St. Port Jefferson, New York	Carr-Lowery Glass Co., Inc. 415 Madison Ave. New York, New York	Purchase Order

(Title 18, United States Code, Sections 1341 and 2.)

COUNT THREE

The Grand Jury further charges:

On or about the 8th day of August, 1972, in the Southern District of New York, DENNIS D'AMATO, the defendant, in a matter within the jurisdiction of a department of the United States, to wit, the United States District Court for the Eastern District of New York, unlawfully, willfully and knowingly made and caused to be made false, fictitious and fraudulent statements and representations

in an "Affidavit" to wit, that he had purchased 1,130 dozen jars of Ultra Sheen hair conditioner in October, 1971, from a company called Balzac Trading and had sold that Ultra Sheen to the customers listed in the affidavit, whereas in truth and in fact, as the defendant then and there well knew, such statements were false, fictitious and fraudulent.

(Title 18, United States Code, Section 1001.)

FOREMAN

PAUL J. CURRAN
United States Attorney

INSTRUCTIONS TO THE JURY
CHARGE OF THE COURT (12:15 p.m.)

THE COURT: Members of the jury, I am sure that you can understand by that announcement and the fact that no one is permitted to enter or leave the courtroom during the charge, that is so you will not be distracted from what I have to say to you because my instructions to you on the law are most important.

You are about to enter upon your final duty, which is to decide the facts issues in this case. I told you at the very start of the trial that your principle funetion during the taking of testimony would be to listen carefully and to observe each witness as he testified, and it has been evident, as counsel themselves have noted, that you have fully discharged that duty.

You are to perform your final duty in an attitude ofcomplete fairness and impartiality. You are to appraise the evidence calmly and deliberately and, as was emphasized by me at the time of your selection as jurors, without bias or prejudice with respect to either the government or to the defendants as parties to this controversy.

The case is important to the government, for the enforcement of criminal laws is a matter of prime concern to the community. Equally, it is important to each of these defendants who are charged with serious crimes.

The fact that this prosecution is brought in the name of the United States of America entitles it to no greater consideration than that accorded to any other party to the litigation. By the same token, it is entitled to no less consideration. All parties stand as equals at the bar of justice.

Your final role is to pass upon and decide the fact issues in this case. You, the members of the jury, are the sole and exclusive judges of the facts. You pass upon the weight of the evidence, you determine the credibility of the witnesses, and you resolve such conflicts as there may be in the testimony and draw whatever reasonable inferences that are to be drawn from the facts as you determine them to be.

My function at this point is to instruct you as to the law. It is your duty to accept these instructions of law and to apply them to the facts as you determine the facts to be, and the logical result of that application will be your verdict in this case.

As I have informed you a number of times, with respect to any fact matter, it is your recollection and yours alone that governs. Anything that counsel either for the government or for the defendants may have said with respect to matters in evidence, that is to say, any factual matter,

whether stated in a question, in argument or in summation, is not to be substituted for your own recollection.

And so, too, anything that the court may have said during the progress of the trial with respect to a fact matter or that I may say during the course of these instructions, is not to be taken in substitution for your own independant recollection, which governs at all times.

Now, before we get to the precise charges involved here, I am going to give you a few preliminary observations. In determining the facts, you should not be influenced by rulings that the court may have made during the trial. These rulings dealt with matters of law and not with questions of fact.

The court's rulings on objections made by either the attorney for the government or the attorney for one of the defendants, are not to be considered by you. Counsel not only have the right but, indeed, it was their duty to press whatever objections they believe existed as to the admission of offered evidence or on any other legal problem raised before me.

During the course of the trial there may have been occasions when I may have admonished either one or the other attorneys here. Sometimes in the ardor of advocacy counsel say or do things which in calmer moments they would not have

said or done. These incidents must play no part in your deliberations. The personalities of the lawyers or of the judge have nothing to do with your resolution of the fact issues in this case.

I recognize as a human being that a judge can have a great deal of influence with a jury. I want you to understand that I have no opinion with respect to the guilt or innocence of these defendants. It is my function as a judge to mask in every way that I can from you any feelings that I might have with respect to the guilt or innocence of the defendants. If I have accomplished my purpose and done my job properly as a judge, you should have no inclination as to how I feel you should decide this case.

If you do think you have that feeling as to the inclunation of how you should decide this case, disregard it entirely. You are the judges of the facts and you are the sole judges of the guilt or innocence of these defendants. I am merely a judge of the law.

You are specifically to understand that I have no opinion as to the guilt or innocence of any one of these defendants, and the facts issues must be decided solely by you and only within the framework of the evidence and the principles of law that apply.

YOu are to consider only the evidence in this case,

and that evidence consists of the sworn testimony of the witnesses, the exhibits which have been received in evidence, the facts which have been stipulated and the presumptions which I will tell you about in these instructions, such as the presumption of innocence.

But while you are to consider only the evidence in the case, you are not limited to the bald statements of the witnesses. On the contrary, you are permitted to draw fromthe facts which you find have been proved, such reasonable inferences as seem justified to you in the light of your own experience.

An inference is merely another word for a conclusion, which reason or common sense leads you to draw from the facts that have been proved here.

In considering the evidence, you must remember, as I told you at the beginning of this trial, that the indictment is only a formal method of accusing a defendant of the crime charged, andin itself is not evidence against the defendant. Nor is any weight to be given to it by the fact that an indictment has been returned against a defendant.

Generally speaking,there are two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence, such as the testi-

mony of an eye witness, somebody who saw or heard something done or said.

The other is indirect or circumstantial evidence which is the proof of a chain of circumstances pointing to the existence or non-existence of certain facts. Generally, the law makes no distinction between direct and circumstantial evidence, but simply requires that the jury find the facts in accordance with all the evidence in the case, both direct and circumstantial.

We have in this court, and I have used it, and some day I am going to find a new way of expressing this, the difference between direct and circumstantial evidence. But jurors here for the first time may find that perhaps the example that we commonly use is sufficient.

If we were looking out the window and can see that it is raining, that would be direct evidence, we would have the rain outside.

Now, let's assume on the other hand that we were in a courtroom right at the very entrance to the building, and assume that when you came into that courtroom in the morning, it being a courtroom in which there are no windows and there was no way that you could see outside.

Assume when you came into that courtroom that morning it was a nice, bright sunny day. Assume that after

we had been in there about an hour or an hour and a half, someone came into the courtroom and his clothes were rather damp and you could see that they were damp and wet.

Assume further minutes later another spectator came in and that spectator had a hat in his hand and the hat was dripping with water and he had an umbrella and the umbrella was dripping with water.

And assume further that a minute or two later another spectator came in with a raincoat and that raincoat was wet.

You could assume from these circumstances, even though you couldn't see the outside, that it was raining outside and that is circumstantial evidence, a chain of circumstances which leads you to conclude that a fact exists, or doesn't exist.

I am not going to go over the evidence withyou in thiscase. It has been a short trial, we commenced this trial on Tuesday morning, I guess, with the selection of the jury, and counsel have covered with you the evidence that they thought was necessary for you to hear in connection with their summations. I am just going to give the names of the witnesses who appeared before you and, where I have it, the occupation or what kind of business they were engaged in.

The first witness was Ernest Reinke, the owner of

the answering service at 1500 Man Street in Port Jefferson.

I am not going to, as I have said, go over the evidence in the case, but this helps, perhaps, to do it just by going over it this way.

The second witness was Phillip E. Patton, from Erie, Pennsylvania. He was employed by the Sterling Seal Company up there and they manufactured and made the screw caps.

He was followed on the stand by Edward N. Hussey, who was employed by Carr-Lowery Glass Company, as salesman here in New York City, and they made the glass jars.

The next witness was James Bausch, of Atkinson Freight Lines. He was followed on the stand by James Chavis, who worked for the Ideal Decorating Company in Brooklyn.

The next witness was Henry M. DAvis, who was an analytical chemist for the Food and Drug Administration for the Government, since 1960.

The next witness was Frank J. Capello, who was a clerk for the Jones Trucking Company, engaged in the general cargo business.

The next witness was Robert D'Amato, brother of the defendant Dennis D'Amato, and he was followed by Ernie Bodeck who was a wholesaler or health and beauty aids.

Then there was Gerald Herman of the Interstate

Cigar Company, which is also a wholesaler of health and beauth aids.

And then Herbert Duianyer of the Amster Company, also a wholesaler of health and beauty aids.

Also Marvin Reiner of Times Square Stores and then there were stipulations read that if certain witnesses were called, they would testify to certain things. A stipulation was entered with respect to the affidavit, which is exhibit 23 in evidence of Dennis D'amato, in connection with the case of Johnson Products pending inthe District Court for the Eastern District of New York, count three in this indictment about which more I will tell you later.

A stipulation that if Marylin Lynnberry were called she would testify with respect to exhibits three and four; Ruth Brown with respect to exhibit8, turned over to the government -- I am getting into a little bit of the facts, but it is your recollection of the facts that controls.

Kenny Burke with respect to exhibit 8. Richard Wasserberger of the Crown Glass Compan y; Edward Knoll -- I am only giving the live witnesses to you. Edward Knoll was on the stand, Baltimore, Maryland. He was the plant manager of the Carr-Lowery Glass Company, and there were more stipulations with respect to James Stafford of the New York Telephone Company and James Roy, an employee of the

Post Office Department, a mail carrier whose route covered 342 East -- I didn't get the name of the street -- but one of those here.

James Boyle, a postal inspector with respect to 14 Metropolitan Avenue.

Stipulations with respect that if the attorney were called with respect to exhibit 23, that the attorney would state that the facts were recited in Manhattan, it was prepared in Manhattan, signed and filed in Brooklyn.

The last government witness was George Zimmer.

Following that the witness Chavis was recalled and testified to you with respect to certain other matters, and I am not going to go into the evidence, or the testimony given here.

As I say, the case has been of short duration, counsel have adequately covered in their summations the necessary parts of the evidence that they think were pertinent for you t to pass upon the questions here, but you cannot take these instructions in a vaccuum, you must place them in context with the evidence adduced here.

Now, I indicated to you in addition to the facts, there are certain things that you could consider, such as a presumption, and I want to read to you now the law with respect to the presumption of innocence, burden of proof and

reasonable doubt.

The law presumes a defendant to be innocent of crime. Thus a defendant, although accused, begins the trial with no evidence against him. And the law permits nothing but legal evidence presented before the jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit a defendant, unless you are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to a defendant; for the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producting any evidence.

The indictment in this case contains three counts or charges.

A separate crime or offense is charged in each count of the indictment. Both defendants are charged in the first two counts; the third count charges the defendant D'Amato alone.

Each offense, and the evidence pertaining to it, should be considered separately. The fact that you may find either or both of the accused, guilty or not guilty of one of the offenses charged should not control your verdict a

as to any other offense charged against any defendant.

It is your duty to give spearate, personal consideration to the case of each individual defendant. When you do so, you should analyze what the evidence in the case shows with respect to that individual, leaving out of consideration entirely any evidence admitted solely against some other defendant. Each defendant is entitled to have his case determined from evidence as to his own acts and statements and conduct, and any other evidence in the case which may be applicable to him.

In that connection, you will note that the affidavid, Exhibit 23, I believe it is in this case, was admitted solely against the defendant D'Amato, and is not to be considered in any way with respect to the defendant Donovan.

I am going to read to you now the pertenent parts of the statute involved in counts one and two, which is the mail fraud statute, Title 18, Section 1341.

"Whoever, having devised ... any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises or to sell, dispose of... distribute, supply, or furnish or procure for unlawful use counterfeit and spurious articles for the purpose of executing such scheme or artifice of attempting so to do, places in any post office or authorized

depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department or takes or receives therefrom, any such matter orthing, or knowingly causes to be delivered by mail according to the directions thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed any such matter or thing..." commits a crime.

Now, in each of the first two counts of the indictment:

"The Grand Jury charges:

"1. From on or about the 1st day of December, 1971, up to and including the date of the filing of this indictment" -- which is December 4, 1973 -- "Robert Donovan, also known as George Zimmer, and Dennis D'Amato, the defendants, and other to the grand jury known and unknown, unlawfully, wilfully and knowingly did devise and intend to devise a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations and promises and to sell, dispose of, distribute, supply, furnish and procure for unlawful use counterfeit and spurious articles.

"2. It was a part of said scheme and artifice that Robert Donovan, also known as George Zimmer, would purchase and cause to be purchased over 27,000 jars and jar caps which were of the same size and type as those used in the manu-

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facture of a hair conditioner and dressing called Ultra Sheen and would cause the saidjars to be printed with a label identical in form to the label used on bottles of the true and genuine Ultra Sheen sold by Johnson Products Co., Inc."

"3. It was further a part of said scheme and artifice that Dennis D'Amato would procure and obtain possession of counterfeit and spurious jars of Ultra Sheen and would thereafter sell said jars as the true and genuine Ultra Sheen.

"4. On or about the dates hereinafter set forth, in the Southern District of New York, for the purpose of executing such scheme and artifice and attempting so to do, Robert Donovan, also known as George Zimmer, and Dennis D'Amato, the defendants unlawfully, wilfully and knowingly did place and cause to be placed in a post office and authorized depository for mail matter to be sent and delivered by the Postal Service, and did take and receive and cause to be taken and received therefrom, and didknowingly cause to be delivered by mail according to the direction thereon, the matters and things hereinafter described:"

Count one, the date is January 18, 1972, a letter from Carr-Lowery Glass Co., Inc., 415 Madison Avenue, New York, New York to Zimmer & Associates, 1500 Main Street, Port Jefferson, New York. That is count one.

Count two, the date is February 17, 1972, from Zimmer Associates, 1500 Main Street, Port Jefferson, New York, to Carr-Lowery Glass Co., Inc., 415 Madison Avenue, New York, New York, and the matter is a purchase order.

Those are the items charged in the first two counts.

Before you may find a defendant guilty of the crime charged in either count one or two, you must be satisfied that the government has proven each of the following elements beyond a reasonable doubt, as to the particular count you are considering.

1. That on or about the dates alleged inthe indictment, the defendants devised or became a party to a scheme or artifice to defraud.

2. That in devising or becoming a party to such scheme or artifice the defendant in question acted with knowledge of its fraudulent nature or with intent to defraud.

3. That a defendant did use or cause another to use the United States mails for the purpose of executing the scheme or artifice.

Each mail fraud count charges a separate use of the mails. Each separate use of the mail in furtherance of the scheme or artifice constitutes a separate and distinct offense. Accordingly, you must determine for each defendant

on each count that is before you whether the government has proved beyond a reasonable doubt these three essential elements of the crime.

I am going to give further definition of the elements concerning the existence of a scheme or artifice to defraud or to obtain money or property by false or fraudulent pretenses.

A "scheme or artifice" is merely a plan for the accomplishment of an object. A scheme to defraud, then, is any plan, device or course of action to obtain money or property by means of false or fraudulent pretenses, representations or promises calculated to deceive persons of average intelligence.

The second element is the knowing and wilful participation. If you find that the government has sustained its burden of proof that a scheme to defraud did exist as charged, you should consider the second element, and that is that the government must prove beyond a reasonable doubt in order to convict a defendant, that he knowingly and wilfully participated in the scheme or artifice to defraud and with intent to defraud and knowingly meant to act purposely and deliberately, rather than through mistake, inadvertence or other innocent reason, In short, that one is aware of what he is doing.

Wilfully has its ordinary meaning, to act intentionally with a bad purpose either to disobey or disregard the law.

Since an essential element of the crime charged is an explicit intent to defraud, it follows that good faith on the part of a defendant is a complete defense. The defendant, however, has no burden to establish a defense of good faith.

As I have told you before, and I told you at the very outset of this case, that the defendants were not required to produce any evidence.

The burden is on the government to prove fraudulent intent and lack of good faith. If you find that a defendant acted in good faith, in the honest belief that he was not concealing the truth and that he did not intend to defraud anyone, or to put it in terms of this case, if you are not satisfied beyond a reasonable doubt that the defendant knew the product was counterfeit, that would be a complete defense to the charge made here.

Finally, with regard to the element of intent to defraud, I think you may find some further explanation helpful in your deliberations. The question of a defendant's intent is a questionof fact which you are called upon to decide, just as you determine any other fact issue.

Intent involves the state of a person's mind, the purpose with which he acted at the time the acts in question occured. Guilty knowledge and especially intent to defraud rarely can be shown by direct evidence. Occasionally a man may write a letter or make a statement or do an act at a given period of time and say "this is what I intend." This is rather unusual. Usually intent is shown by circumstantial evidence.

We know you can't look into a person's mind and ascertain what his intent was. Often, the only way you may arrive at a conclusion as to a person's intent is by examining all the surrounding circumstances, including his acts, statements and so forth.

With regard to the third and last element, use of the mails for the purpse of executing the scheme or artifice. Before a defendant may be found guilty, the Government, in addition to the two essential elements just mentioned, must prove beyond a reasonable doubt the use of the mails in furtherance of the scheme to defraud. Here the government relies on various mailings which have been introduced in evidence.

It is not necessary to show that a defendant actually mailed any of the items referred to. This is not required, nor is it necessary that the scheme contemplated

the use of the mails. It is sufficient if you find that the defendant caused the mailing by others, and this does not mean that the defendant himself specifically authorized others to dothe mailing, where one does an act with knowledge that the use of the mails will follow in the ordinary course of business or where such use of the mails can reasonably be foreseen, even though not actually intended, then he causes the mails to be used. The government must establish beyond a reasonable doubt that the particular mailing that is charged in each count was made during the existence of the scheme and in its furtherance.

However, it is not necessary that the government show all the defendants used the mails. A mailing caused by one of the defendants in the furtherance of the scheme to defraud binds all of the parties to the scheme if it could be reasonably foreseen that the mails would be used. Finally, the mail matter need not disclose a fraudulent representation on its face.

This concludes my explanation of the elements of mail fraud charged in the first two counts of the indictment. Before continuing, I want to explain to you a theory of law referred to as "aiding and abetting."

With regard to counts one and two of the indictment, the government relies upon a statute which reads in relevant

part as follows:

"Whosoever commits an offense... or aids, abets, or counsels, commands, induces or produces its commission", is punishable as a principal.

This means that not only is the person who actually commits an illegal act, the principal, punishable, but anyone who aids and abets him in committing that illegal act is likewise punishable.

Accordingly, you may find the defendants Donovan and D'Amato guilty of the offense charged if you find beyond a reasonable doubt that the offense was committed and that the defendants aided and abetted in its commission.

In determining whether or not the defendant aided and abetted the commission of the offense you may ask yourselves these questions:

Did he associate himself with the venture?

Did he participate in it as something he wished to bring about?

Did he seek by his action to make it succeed?

If he did these things, then he is an aider and abettor.

However, the mere association or friendship between the defendant and an alleged principal is not sufficient to establish one as an aider and abetter.

Moreover, mere presence at the scene of the crime and knowledge that a crime is being committed are not sufficient to establish that the defendant aided and abetted the crime, unless you find beyond a reasonable doubt that the defendant was a participant and not merely spectator.

For count three, which involves only the defendant D'Amato, the statute involved in this count is Section 1001 of Title 18, United States Code. Section 1001 reads:

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and wilfully makes any false, fictitious or fraudulent statements or representations..." commits a crime.

Count three of the indictment reads as follows:

"The grand jury further charges:

"On or about the 8th day of August, 1972, in the Southern District of New York, Dennis D'Amato, the defendant, in a matter within the jurisdiction of a department of the United States, to wit, the United States District Court for the Eastern District of New York, unlawfully, wilfully and knowingly made and caused to be made false, fictitious and fraudulent statements and representations in an "Affidavit" to wit, that he had purchased 1,130 dozen jars of Ultra Sheen hair conditioner in October, 1971, from a company called Balzac Trading and had sold that Ultra Sheen to the customers

listed in the affidavit, whereas in truth and in fact, as the defendant then and there well knew, such statements were false, fictitious and fraudulent."

Before you may find the defendant D'Amato guilty of the crime charged in count three of the indictment, you must be satisfied that the government has proved each of the following elements beyond a reasonable doubt:

1. That on or about the date specified, in the Southern District of New York, the defendant made or caused to be made a statement.

2. That the statement contained false and fictitious writings and representations.

3. That the false statement was knowingly and wilfully made.

4. That the statement or representation was made in a matter within the jurisdiction of a department or agency.

Now, a statement is false or fictitious if it is untrue when made, and then known to be untrue by the person making it or causing it to be made. A statement or representation is fraudulent, if known to be untrue, and made or caused to be made with the intent to deceive the government agency to whom submitted.

The word false must be considered together with the words Knowingly and wilfully. An act is done knowingly if

done voluntarily and intentionally, and not because of mistake or accident or other innocent reason. An act is done wilfully if done voluntarily and intentionally and with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the law.

The word knowingly is added in order to insure that no one would be convicted who made or caused to be made a statement or representation which was false because of mistake or accident or other innocent reason.

If you find that the accused did not knowingly and wilfully make any false statements or cause any to be made, you should acquit the accused.

I charge you that, as a matter of law, the submission of the affidavit to the United States District Court for the Eastern District of New York is a matter within the jurisdiction of a department of the United States. If you find that these documents were submitted to that court, then this element of the crime is satisfied and you must find that this matter was within the jurisdiction of a department or agency of the United States.

Those are the specific charges, but before letting you go for deliberations, I want to give you a few additional charges.

I have told you that the government has the burden of proving guilt beyond a reasonable doubt and naturally you would ask, "What is a reasonable doubt?"

The words almost define themselves. That there is a doubt founded in reason and arising out of the evidence or lack of evidence. It is a doubt which a reasonable person has after carefully considering all the evidence.

A reasonable doubt is not a vague or speculative or imaginary doubt. It is not caprice, whim or speculation. It is not an excuse to avoid the performance of an unpleasant duty. It is not sympathy for a defendant.

A reasonable doubt is a doubt which appeals to your reason, your common sense, your experience, and your judgment. It is a doubt which would cause a reasonable man or woman like yourselves to hesitate to act in relation to your own important private affairs.

Mere suspicion will not justify conviction. Suspicion is not a substitute for evidence, nor is it sufficient if you find that the circumstances merely render an accused probably guilty.

On the other hand, it is not required that the government must prove guilt beyond all possible doubt. But the proof must be of such convincing character that you would be willing to rely and act on it in the important

affairs of your own lives.

In sum, a reasonable doubt exists whenever, after a fair and impartial consideration of all of the evidence before you, you can candidly and honestly state that you do not have an abiding conviction that the defendant is guilty of the charge.

Now, there has been evidence introduced in connection with cout three of the indictment concerning an affidavit of the defendant D'Amato containing a number of statements tending to show that he was not involved in any scheme to defraud by selling counterfeit Ultra Sheen.

When a defendant voluntarily and intentionally offers an explanation, or makes some statement tending to show his innocence, and this explanation or statement is later shown to be false, the jury may consider whether this circumstantial evidence points to a consciousness ofguilt. Ordinarily, it is reasonable to infer that an innocent person does not usually find it necessary to invent or fabricate an explanation or statement tending to establish his innocence.

Whether or not evidence as to a defendant's voluntary explanation or statement points to a consciousness of guilt, and the significance to be attached to any such evidence, are matters exclusively within the province of the jury.

As I indicated to you before, a statement or an

act is knowingly made or done, if made or done voluntarily and intentional, and not because of mistake or accident or other innocent reason.

As I have indicated before, and this is not to over-emphasize it, but you must always bear in mind that the-lawnever imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Now, with respect to the credibility of witnesses, you are the sole judges of the credibility of the witnesses and the weight their testimony deserves.

You should carefully scrutinize the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to indicate whether the witness is worthy of belief. Consider each witness' intelligence, motive and state of mind, and demeanor and manner while on the stand.

Consider also any relation each witness may bear to either side of the case; the manner in whixh each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or countradicted by other evidence.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses,

may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection, is not an uncommon experience.

In weighing the effect of a discrepancy, consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or wilful falsehood.

If you find that any witness has testified falsely, you can do one of two things. You can either reject all of that witness' testimony on the ground that it is all tainted by falsehood and that none of it is worthy of belief, or you can accept that part which you believe to be credible and reject only that part which you believe to be tainted by falsehood. That is what the law says you can do with the testimony of a witness whom you believe testified falsely while on the witness stand.

If it is peculiarly within the power of either the prosecution or the defense to produce a witness who could give material testimony on an issue in the case, failure to call that witness may give rise to an inference that his testimony would be unfavorable to that party.

However, no such conclusion should be drawn by you with regard to witnesses who are equally available to both

parties, or where a witness' testimony would be merely cumulative.

The jury will always bear in mind that the law never imposes on a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

I told you when we were in the process of selecting you as jurors, a defendant is not required under our laws to prove his innocence, he is presumed to be innocent at all times and through the entire trial, unless and until the government proves him guilty beyond a reasonable doubt. For these reasons, a defendant need not take the witness stand and testify in his own behalf.

Therefore, the fact that the defendants did not testify at this trial does not create any presumption against either of them, and I charge you that this fact must not weigh in the slightest against either defendant, nor shall this fact enter into your discussions or deliberation in any manner.

I ask you as judges of the facts, and I do not want to encroach on your function in this respect, please do not discuss the question of possible punishment. That is a matter that rests on my conscience and my conscient alone, because the judge and the judg e alone is the one that has the obligation of imposing sentence, when and if guilt is determined.

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If you do discuss it amongst yourselves then you are encroaching on my job, and I ask you not to do it. Your job is to consider the facts and to determine the facts, and my job is to pass upon the law, and in the event of conviction to impose sentence.

If you find on all the evidence, that the evidence respecting a defendant leaves a reasonable doubt as to his guilt, you should not hesitate for a moment to return a verdict of acquittal as to that defendant.

However, on the other hand, if you find beyond a reasonable doubt that the law has been violated as charged, you should not hesitate, because of sympathy or because of any other reason, to render a verdict of guilty.

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors.

In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if con-

vinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

You are not partisans. You are judges, judfes of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

If it becomes necessary during your deliverations to communicate with the court, you may send a note by the marshall, signed by your foreman, or by one or more members of the jury. No member of the jury should ever attempt to communicate with the court by any means other than a signed writing; and the court will never communicate with any member of the jury on any subject touching the merits of the case, otherwise than in writing, or orally here in open court.

You will note from the oath to be taken by the marshals that they too, as well as all other persons, are forbidden to communicate in any way or manner with any member of the jury on any subject touching the merits of the case.

Bear in mind also that you are never to reveal to any person, not even to the court, how the jury stands, numerically or otherwise, on the question of the guilt or innocence of the accused,until after yo have reached an unanimous verdict.

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Again, I want to remind you that nothing said in these instructions is to suggest or to convey in any way or manner any intimation as to what verdict I think you should find. What the verdict shall be is the sole and exclusive duty and responsibility of the jury.

I indicated to you that you will have available for you a copy of the indictment, and I have prepared a form of verdict which I neglected to have typed up before I came here and Iwas going to go through this with you and pass it on to counsel and ask them if they have any objection to my submitted the form of verdict to the jury.

MR. O'BRIEN: No objection.

MR. SHARGEL: No objection.

MR. WILSON: No, sir.

THE COURT: All right. I hope you can read my writing and I would like you to follow the form of verdict when you report your verdict.

I have put it this way, "on count one, we, the jury, unanimously find the defendant Robert Donovan" and I left a blank. And on count one, "we, the jury, find the defendant Dennis D'Amato" and I left a blank. All the way through, that is the usual way you report your verdict.

You may have the indictment and you may have any testimony re-read to you, or you may have any exhibits that

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have been received in evidence.

You may have any parts of my charge re-read to you if you wish it and all thatis required is to send a note through the marshal to me.

Before I send you out, counsel have an opportunity to make, in your absence, any requests or exceptions to my charge. So if you will wait just a moment, we will take those at the side bar.

(At the side bar.)

MR. O'BRIEN: I have to take exception to your honor's definition of the third element of the mail fraud and that is causing or the use of the mails in the execution of the fraud.

In particular, I take exception and I will try and condense this and do it as quickly as possible, to your statement that it is not necessary that the scheme contemplate the use of the mails and that the defendant intended the mails to be used. And also your Honor said something about if it was a normal business practice, then that would involve the use of the mails.

Also, that part -- I don't know if I got it correctly -- defining the causing and I would specifically request to satisfy me, that you charge at least all or part of the causing that I have requested in my request number 2,

and that the mails were used for the purpose of executing the fraud as I have requested in my numbers 5 and 7.

In addition, there is a Second Circuit case which puts forth a fourth element that someone must have been defrauded in the mail fraud and I think I cited this in my requests to charge which I submitted to the court.

That is it.

MR. SHARGEL: I respectfully except to that portion of your Honor's charge regarding the instruction on the defendant's knowledge or the failure to charge that the defendant D'Amato must have either used the mails or knowingly caused the mails to be used and that the frame of reference of proof that he had to have actual knowledge that the mails were used.

I further except to that portion of your Honor's charge where you defined circumstantial evidence and specifically, my exception with regard to reasonable doubt.

That is, the failure to charge the jury that circumstantial evidence must satisfy the jury beyond a reasonable doubt and exclude every hypothesis of innocence.

I except to that portion of your Honor's charge regarding count three of the indictment, the false statements, in that I believe your Honor failed to charge the jury that the falsity of the statement must be as to a material fact.

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That is all I have.

MR. WILSON: The government has norequests and I don't believe we can take exceptions.

THE COURT: I will refust to charge except as charged.

That is as far as the exceptions. Are there any additional requests?

MR. SHARGEL: I have a request that your Honor give the jury the materiality aspect of the falst statement.

THE COURT: All right.

(In open court.)

THE COURT: In one way I have a happy thing to do and that is to report that our jury is intact and the twelve original members are still with us. I am going to excuse the two alternates who have been so attentive here and I know how difficult it is for you to sit here and get to this stage of the proceedings and not join in the final deliberations with your co-jurors.

But yours is a very necessary function to this entire process and I appriciate very much your attention to this case and your being here.

(Alternate jurors excused.)

THE COURT: I suggest when lunch does arrive --I thought it would be here by one o'clock, you take your time

to enjoy your lunch. However, that is not an instruction, that is entirely your province as to how you should conduct your deliberations, that is up to you.

Swear the marshal.

(Marshal sworn by the clerk.)

(Jury retired to deliberate at 1:20 p.m.)

THE COURT: Gentlemen, I didn't give them a copy of the indictment. If they request it, do you have any objection?

MR. O'BRIEN: No objection.

THE COURT: I suggest you get all the exhibits together and if they request an exhibit, will you give us your authority to send them in through the court, without requiring you to be here in order to do it?

MR. SHARGEL: In the past I have unhesitatingly. I have one problem and that is the check. Your Honor has ruled that Mr. Wilson't comments regarding it are improper. I object to the check going back in there.

THE COURT: Let's hold that for the time being. Is there another one?

MR. WILSON: There is something on there, that was the exhibit which contained -- government exhibit 19 in evidence -- I has the name Gene Maloney on it. I submit it makes no difference at all, since the name is already in

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A 202 Affidavit of Personal Service of Papers H LUTZ APPELLATE PRINTERS INC.

U.S. COURT OF APPEALS:SECOND CIRCUIT

Index No.

U.S.A.,

Appellee,

against

Affidavit of Personal Service

DONOVAN, et al,

Defendants-Appellants.

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, James Steele, being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

250 West 146th Street, New York, New York

That on the 16th day of July 1974 at Foley Square, New York

deponent served the annexed Appellant's Brief and Appendix upon

Paul J. Curran-U.S. Attorney for the Southern Dist.-Attorney for Appellee

the in this action by delivering 2 true copies thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein,

James Steele

Print name beneath signature

Sworn to before me, this 16th day of July 1974

JAMES STEELE

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0416950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975

Robert T. Brin